No. 97-634

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS, et al.,

Petitioner,

v.

RONALD R. YESKEY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF THE NATIONAL PRISON PROJECT OF THE ACLU FOUNDATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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March 30, 1998

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights and the nation's civil rights laws. The ACLU established the National Prison Project in 1972 to protect and promote the civil rights of prisoners. In furtherance of that goal, the National Prison Project has brought numerous cases on behalf of prisoners, including disabled prisoners seeking access to prison facilities, services and programs under the Rehabilitation Act and the Americans with Disabilities Act. More specifically, the National Prison Project has a direct interest in the outcome of this case because it represents Petitioners in *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589 (4th Cir.), *petition for cert. filed,* 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113), which also raises the issue of whether Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act apply to state prisoners.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime, to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of

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[1]Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

almost 10,000 attorneys and 28,000 affiliate members in fifty states. NACDL is recognized by the American Bar Association as an affiliate organization, and has full representation in the ABA's House of Delegates. As part of its mission, NACDL strives to defend individual liberties guaranteed by the Bill of Rights.

SUMMARY OF ARGUMENT

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), this Court stated: "[I]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Following this principle, the courts of appeals for the Third, Seventh and Ninth Circuits, and many lower courts have held that the unambiguous statutory language clearly demonstrates Congress' intent to apply Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA) to state prisons.

The ADA's explicit statutory findings reflect its purpose to eliminate discrimination in institutionalized settings. The plain language applies the ADA to state and local corrections agencies as "public entities" that provide "programs, services and activities." Furthermore, the ADA explicitly incorporates "the standards applied" under title V of the Rehabilitation Act and its implementing regulations which, as Congress well knew, specifically apply the statute to state prisons.

The intent of Congress is therefore clear. It is also accurately reflected in the ADA regulations promulgated by the Department of Justice (DOJ). Like the § 504 regulations that preceded them, they too specifically include state prisons within the scope of the ADA. DOJ's regulations are entirely

consistent with the broad remedial purpose of the ADA and are entitled to substantial deference under *Chevron*. Because prison management is not an inner "core state function" as that term is used in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), the clear statement rule is inapplicable to this case. In any event, the statutory language is unambiguous.

Disabled prisoners experience enormous obstacles seeking equal access to toilets and showers, as well as other facilities and services. The ADA affords them *equal access*, not special privileges. It requires public entities to make "reasonable modifications" that do not "fundamentally alter" their programs or impose "undue financial or administrative burdens." These are fact-intensive, individualized determinations that take security risks into account, among other factors, and are thus responsive to the concerns of prison administrators.

This Court should decline petitioners' invitation to rewrite the statute by creating out of whole cloth a "prison exception" to the ADA that is flatly contrary to the clearly expressed intent of Congress.

ARGUMENT

I. DISABLED PRISONERS SEEK EQUAL ACCESS TO FACILITIES, NOT BETTER TREATMENT THAN OTHERS

Title II of the ADA, like Section 504 of the Rehabilitation Act, requires the elimination of obstacles to equal access; it does not require public entities to provide special programs or privileges for disabled people. *See Alexander v. Choate*, 469 U.S. 287, 300 & n.20 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397, 410-11 (1979) (distinguishing federal employers' affirmative action

requirement in § 501 from the equal access requirement of § 504); *cf.* Pet'r Br. at 29. Disabled prisoners "have a right, if the [ADA] is given its natural meaning, not to be treated even worse than those more fortunate [able-bodied] inmates." *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997) (Posner, C.J.). Seeking *equal* access, not better treatment than others, disabled prisoners have raised substantial claims of discriminatory treatment in seeking relief under the Rehabilitation Act and the ADA.[2]

A. Disabled Prisoners Face Unnecessary Physical Barriers to Prison Services and Programs

Disabled men and women in prisons and jails throughout the country often face dangerous physical obstacles when seeking access to facilities and services such as toilets and showers, dining halls, medical clinics, emergency alarms and exits, and programs.[3] Confined in facilities that are not

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[2]The cases cited herein serve to illustrate the range of problems experienced by disabled prisoners; they do not represent an exhaustive list of cases brought by prisoners under the ADA and Rehabilitation Act. *Amici* have discussed facts obtained from pleadings filed in prison cases throughout the country which were not necessarily resolved by the courts. For this reason, *amici* have noted plaintiffs' allegations and cited to relevant pleadings, even in cases where decisions were reported on other issues.

[3]For a discussion of the demographics of disabled prisoners and a description of the range of disabilities among prisoners, *see generally* Gardner, *Legal Commentary: The Legal Rights of Inmates with Physical Disabilities*, 14 St. Louis U. Pub. L. Rev. 175, 176-77 (1994).

handicap-accessible, disabled prisoners suffer needlessly because of the failure of prison administrators to make even inexpensive accommodations such as installation of grab-bars and ramps to accommodate their needs.

A wheelchair user in an Indiana county jail alleged that he was locked in a "padded cell [that] had no bed or other furniture, no running water, and only an open drain in the floor for disposal of bodily waste" for three months. *Noland v. Wheatley*, 835 F. Supp. 476, 480 (N.D. Ind. 1993) (denying defendants' motion to dismiss and qualified immunity claim, citing their "complete lack of effort and outright refusal to accommodate" plaintiff). This semi-quadriplegic prisoner reportedly developed pressure sores that were painful and potentially life-threatening. *Id.* at 480. Mr. Noland had no use of his legs, only limited use of his hands, no bladder, and he wore colostomy and urostomy bags for removal of his body waste. *Id.* The sheriff had available other jail cells with running water, but chose not to assign Mr. Noland to one of them. *Id.* Despite the critical importance of hygiene to prevent infection, he was allegedly denied adequate access to soap and water. *Id.* When it was not his "bath day," Mr. Noland was often reportedly forced to eat his meals with human waste on his hands and body due to spillage from his bags. *Id.* at 481.

Toilets are literally beyond the reach of wheelchair users when prison bathroom doorways are too narrow and walls lack proper grab-bars. A bilateral amputee in a county jail in Michigan reportedly fell into the toilet and onto the floor next to it when he attempted to transfer from his wheelchair because the toilet "lacked both handrails and a seat, and was set into a narrow stall into which he could not maneuver his wheelchair." *Kaufman v. Carter*, 952 F. Supp. 520, 524 (W.D. Mich. 1996) (denying defendants' summary judgment motion on qualified immunity grounds for their

failure to provide access to bathrooms and showers). Unable to reach the toilets, paraplegic prisoners with no bladder or bowel control must reportedly remove their urinary catheters in order to empty their waste bags and relieve themselves wherever they may be. *Hadix v. Johnson*, No. 96-2548, Plaintiffs-Appellees' Final Br. at 27 (6th Cir. filed July 30, 1997). Prisoners further allege that they fall when shifting from their wheelchairs to toilets and defecate on themselves in public program areas including schools, libraries, chapels and recreation yards. *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, No. 97-1113, Pet. for Cert. at 3 (U.S. filed Dec. 19, 1997); *Armstrong v. Wilson*, No. 97-686, Opp'n to Pet. for Cert. at 2-3 (U.S. filed Nov. 19, 1997).

Showers pose life-threatening conditions for severely disabled prisoners. Without adequate support, paraplegic prisoners and amputees allegedly risk falling and seriously injuring themselves on dangerous slippery tile or scalding themselves due to their inability to adequately control water temperature. *Kaufman*, 952 F. Supp. at 523; *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, No. 96-7091, Appellants' Opening Br. at 6-7 (4th Cir. filed Oct. 1, 1996).

Medication dispensaries and medical clinics are often accessible with great difficulty, if at all. In Maryland, inmates allege they cannot propel their wheelchairs up the steep ramp necessary to reach the medication dispensary. *Amos*, No. 97-1113, Pet. for Cert. at 3. In Michigan, a 65-year-old wheelchair user with cancer and coronary problems reportedly had to forego his medications because prison staff refused to allow other prisoners to push his wheelchair and he lacked the energy to propel himself to the clinic. *Hadix*, No. 96-2548, Plaintiffs-Appellees' Final Br. at 27.

B. Disabled Prisoners are Subjected

to Discriminatory Exclusion from Programs, Services, and Activities

Confined in isolation units, disabled prisoners are denied access to program facilities or services that are routinely offered to general population inmates. A quadriplegic prisoner in Indiana was housed in an infirmary unit for over one year and denied access to the dining hall, recreation area, visiting, church, work, transitional programs and the library, due to his infirmary placement. *Love v. Westville Correctional Ctr.*, 103 F.3d 558, 559 (7th Cir. 1996) (holding that prison officials discriminated against the plaintiff by denying him access to services). A blind prisoner housed in isolation in the self-care prison unit in Indiana alleged that he was denied access to the dining hall and to outside recreation, church services, education, library and pre-release training although he was ambulatory and once on site, required little assistance. *Crawford v. Indiana Dep't of Corrections*, No. 3:96-CV-0125AS, Complaint at 3-7 (N.D. Ind. filed Feb. 21, 1996). Chief Judge Posner likened his situation to that of an African-American person barred from the dining hall due to prison staff's discriminatory treatment. *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997).

In California, prison officials stipulated to the fact that prisoners who use wheelchairs and those on dialysis spend significantly longer periods of time than non-disabled inmates in reception centers, where they have access to fewer programs. *Armstrong v. Wilson*, No. C-94-2307, Statement of Stipulated Facts at 7 (N.D. Cal. filed July 9, 1996). It is reportedly commonplace that disabled prisoners are barred from participation in programs offered to able-bodied prisoners such as religious services, contact family visits, and telephone access, all of which are afforded to general population inmates. *Armstrong*, No. C-94-2307, Statement of Stipulated

Facts at 9-10; *Amos*, No. 96-7091, Appellants' Opening Br. at 10-11.

Deaf and hearing-impaired prisoners are unnecessarily cut off from essential facilities and services ranging from telephones, medical and mental health diagnosis and treatment, counseling, disciplinary, grievance and parole proceedings, and even emergency fire alarm systems.[4] Without access to qualified sign language interpreters, they are often unable to communicate with prison staff to follow orders, or with health care staff, or to participate in educational, work, training and substance abuse programs to prepare for their release. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1029-32 (S.D.N.Y. 1995).

The discriminatory treatment of disabled prisoners not only makes for harsher punishment in terms of their conditions of confinement; it lengthens their incarceration, because program participation often results in lower security classification and credit toward release. *Amos*, No. 96-7091, Appellants' Opening Br. at 11; *Armstrong*, No. 97-686, Opp'n to Pet. for Cert. at 3.

Inaccessible facilities and transport vehicles pose grave risks for disabled prisoners who require accommodations to

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[4]*See, e.g., Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988) (reversing grant of summary judgment for defendants on deaf inmate's statutory claims alleging that prison officials' failure to provide him with qualified interpreters foreclosed his participation in programs for which he was otherwise qualified); *Duffy. v. Riveland*, 98 F.3d 447 (9th Cir. 1996) (same); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1027-32 (S.D.N.Y. 1995); *Randolph v. Rogers*, 980 F. Supp 1051 (E.D. Mo. 1997).

ensure their safe evacuation in the event of emergency. Although disabled prisoners run the risk of being trapped in the event of fire, prison staff do not receive special training on their safe evacuation. *Armstrong*, No. C-94-2307, Statement of Stipulated Facts at 7-8.

II. THE ADA UNAMBIGUOUSLY APPLIES TO STATE PRISONS

A. The Language of the Statute is Broadly Inclusive and Incorporates Specific Reference to State Prisoners

Congress enacted Title II of the ADA to prohibit public entities from discriminating against disabled people.[5] That disabled prisoners were among those Congress had in mind when it enacted the ADA is evident from the explicit statutory findings that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." 42 U.S.C.A. § 12101(a)(3) (West 1995).[6]

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[5]Title II provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132 (West 1995).

[6]Petitioners argue that "'institutionalization' has nothing to do with prisons." Pet'r Br. at 16. However, the legislative history relied upon by Petitioners demonstrates that disabled prisoners were indeed among the institutionalized groups about

Moreover, the plain language of the ADA applies the statute clearly and unambiguously to state prisons and jails as "public entities"[7] that provide "services, programs, or activities." 42 U.S.C.A. § 12132. The phrase "program or activity" is defined in the Rehabilitation Act as "all of the operations of . . . a department, agency, . . . or other instrumentality of a State or of a local government." 29 U.S.C.A. § 794(b)(1)(A) (West Supp. 1997). This definition is incorporated into the ADA through 42 U.S.C.A. § 12201(a), which provides in its entirety:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards

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whom Congress was concerned. In a 1983 report incorporated into the congressional record, the United States Commission on Civil Rights identified "major types or areas of discrimination" in the criminal justice system, including the "[d]isproportionate number of mentally retarded people in prisons and juvenile facilities;" "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities;" "[i]nadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible jail cells and toilet facilities);" and "[a]buse of handicapped persons by other inmates." U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, Sept. 1983, App. A at 168. *See* S. Rep. No. 101-116, at 8 (1989); H.R. Rep. No. 101-485, pt. 2 at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312; Pet'r Br. at 17.

[7]State and local correctional agencies fall within the ADA's definition of "public entity" as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C.A. § 12131(1).

> applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C.A. § 12201(a) (West 1995). In enacting the ADA, Congress thus incorporated the standards of coverage from the Rehabilitation Act, including the definitions of "program" and "activity."[8]

The ADA defines as "qualified" "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C.A. § 12131(2). Under this definition, essential program criteria need not be waived. Contrary to Petitioners' assertion, nothing in the statutory language indicates that voluntariness is an essential element of participation.[9]

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[8]Title V of the Rehabilitation Act includes Section 504, which is codified at 29 U.S.C. § 794.

[9]This Court's frequent references to prisoner "participation" in "programs" and "services" reflects the plain meaning of those terms. *See, e.g., Block v. Rutherford*, 468 U.S. 576, 580 (1984) ("contact visitation program"); *Hudson v. Palmer*, 468 U.S. 517, 552 (1984) ("rehabilitative programs and services"); *Olim v. Wakinekona*, 461 U.S. 238, 246 (1983) ("appropriate correctional programs for all offenders"). Petitioners' use of these terms undercuts their argument that prisons do not provide "services, programs, and activities." *See* Pet'r Br. at 31-32; Br. of *Amici* States Attorneys General at 5; Br. of *Amici* Council of State Gov'ts at 11.

In addition to the broadly inclusive statutory language, DOJ promulgated regulations that specifically apply the Rehabilitation Act to state prisons and Congress expressly incorporated these regulations into the ADA pursuant to the language of 42 U.S.C.A. § 12201(a).[10] Petitioners' obligation to obey those regulations, therefore, is not a matter of *Chevron* deference but Congressional command.

Of particular note, the ADA's statutory incorporation provision includes the preamble to the DOJ regulations implementing the Rehabilitation Act, which explicitly requires that "a sufficient number of detention cells need be accessible to wheelchair users" in detention and correctional facilities.[11]

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[10]This provision incorporates the regulations issued under 29 U.S.C.A. §§ 790 *et seq.*, from Sections 500 through 506 of the Rehabilitation Act, including the 1980 regulations, which were designed to "implement section 504." Congress also adopted in the ADA "any requirements of those regulations . . . such as program access that go beyond titles I and III." H.R. Rep. No. 101-485, pt. 2 at 84, *reprinted in* 1990 U.S.C.C.A.N. 303, 366-67. And the ADA further includes "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [of the Rehabilitation Act] . . . to any person alleging discrimination on the basis of disability in violation of section 12132." 42 U.S.C.A. § 12133 (West 1995).

[11]45 Fed. Reg. 37,620, 37,630; 28 C.F.R. pt. 42(G), app. B, subpt. (c)(2) (1980). These regulations further require that:

> [f]acilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. . . . In making housing and program assignments, such [correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmates.

45 Fed. Reg. at 37,630.

The regulations define "program" to include the operations of a department of corrections, and "benefit" to include disposition, sentencing and confinement.[12]

Congress, by incorporating these regulations into the ADA itself, expressly applied the statute to state prisons. When, as here, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

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[12]45 Fed. Reg. 37,620, 37,627; 28 C.F.R. § 42.540(h), (j) (1980). In addition, regulations promulgated under Section 502 of Title V of the Rehabilitation Act, codified at 28 C.F.R. § 42.522(b) (1988), adopt the Uniform Federal Accessibility Standards [UFAS] accessibility guidelines. UFAS specifically mentions jails, prisons, and "other detention or correctional facilities." 41 C.F.R. pt. 101, subpt. 101-19.6, app. A at 4.1.4(9)(c) (1997). Agencies have the choice of following UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) in meeting their obligations under the ADA, and need not follow *either* set of guidelines, as long as they provide equivalent access. 28 C.F.R. § 35.151(c) (1997).

Because the language of the ADA is unambiguous, there is no occasion for this Court's application of the "clear statement rule" of statutory construction as set forth in *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). In *Gregory*, this Court found that the text of the Age Discrimination in Employment Act of 1967 (ADEA) was ambiguous with respect to coverage of state judges and, accordingly, held that it did not preempt a state constitutional provision mandating retirement of state judges at age 70.

Alternatively, the clear statement rule has been satisfied in this case because Congress has stated that the non-discrimination mandate of the ADA applies to all operations of state and local governments, has authorized the DOJ to promulgate regulations that specifically apply the statute to state prisons, and then has actually incorporated these regulations into the ADA.

B. Because Prison Management Does Not Go to "the Heart of Representative Government," the Regulations Applying the ADA to Prisons are Entitled to Substantial Deference

The Court in *Gregory* declined to resolve the statutory ambiguity in the ADEA in favor of coverage of state judges because to do so would preempt Missouri's state constitutional provision which "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. Here, by contrast, the statutory language is unambiguous and application of the ADA to prisons would not infringe upon a core function going to the "heart of representative government." *See Crawford*, 115 F.3d at 485 (Posner, C.J.) (holding that the "mere provision of public services, such as schools and prisons, is not within that inner core [of sovereign

functions.]")

Unlike *Gregory*, therefore, the regulations in this case explicitly applying the ADA to state prisons are entitled to substantial deference under *Chevron*. Congress directed the Attorney General to promulgate regulations implementing the ADA,[13] and to "coordinate the compliance activities of Federal agencies with respect to State and local government[s]" that administer "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions."[14] The ADA's interpretive analysis[15] also makes it explicit that the regulations apply to state prisoners. 28 C.F.R. pt. 35 app. A, § 35.102 at 478 (1997) (requiring "attendant care, or assistance in toileting, eating or dressing to individuals with disabilities" only in "special circumstances," such as in correctional institutions.)[16]

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[13]42 U.S.C.A. § 12134(a).

[14]28 C.F.R. § 35.190(a), (b)(6).

[15]This Court accords the same deference to the DOJ interpretive analysis as to the regulations themselves. *Alexander v. Choate*, 469 U.S. at 305 & n.26 (1985).

[16]*See also* 36 C.F.R. § 1191.2 (1997) at 12.1 (applying the ADA to "jails, holding cells in police stations, prisons, juvenile detention centers, reformatories, and other institutional occupancies where occupants are under some degree of restraint or restriction for security reasons.") In addition, the DOJ Title II Technical Assistance Manual specifically lists "jails and prisons" as types of facilities that, if constructed or altered after the effective date of the statute, must be readily accessible to and usable by individuals with disabilities. U.S. Dep't of Justice, The Americans with Disabilities Act: Title

In *Chevron*, this Court held that administrative agency regulations are entitled to deference unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Absent that showing, which cannot be made here, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* Moreover, this Court has repeatedly applied the *Chevron* rule when interpreting the disability discrimination statutes, stressing that the regulations, because they were promulgated with the oversight of Congress, are an important source of guidance and merit substantial deference. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Alexander v. Choate*, 469 U.S. at 304 n.24; *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987).

The ADA regulations effectuate the broad remedial purpose of the statutes to eliminate discrimination, are entirely consistent with the plain meaning of the statutory language and impose no obligations on state prisons beyond those mandated by the statutes' broad nondiscrimination mandate.

For the courts to create by judicial fiat a "prison exception" to the ADA that is contrary to the unambiguous language of Congress would usurp the legislative function, and run counter to this Court's recent admonition that:

> Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench

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II Technical Assistance Manual II-6.0000 - II-6.3300(6) (1993).

> upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.

Salinas v. United States, 118 S. Ct. 469, 475 (1997) (internal quotation marks and citations omitted).

III. THE ADA INCORPORATES PRINCIPLES OF DEFERENCE TO STATE OFFICIALS

Public entities need not make accommodations that impose "undue financial and administrative burdens" or require "'fundamental alteration in the [essential] nature of [the] program.'" *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17 (citation omitted); *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979); 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 35.150.

Individualized determinations are necessary to assess whether public entities have discriminated in violation of the statutes. *See Arline*, 480 U.S. at 287-88. This approach is highly fact-intensive and takes into account several factors including the program's requirements, the prospective participant's qualifications, and the impact of the accommodation. Such an inquiry is responsive to the security concerns of prison administrators, for "[a] person who poses a significant risk . . . to others . . . will not be otherwise qualified . . . if reasonable accommodation will not eliminate that risk." *Arline*, 480 U.S. at 288 n.16.[17]

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[17]*See also* 28 C.F.R. pt. 35 app. A at 472 (program modifications are not required if participation results in a "significant risk of a direct threat to the health or safety of others"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) ("courts will not second-guess the public health and safety decisions of state legislatures acting within their

The statutory inquiry necessarily requires factfinding to determine whether disabled plaintiffs can be reasonably accommodated without undue burden on program administrators. *See Arline*, 480 U.S. at 288 (remanding to determine whether an elementary schoolteacher was "otherwise qualified" for the job in spite of her tuberculosis).[18]

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traditional police powers. However, . . . it is incumbent upon the courts to insure that the mandate of federal law is achieved.") (internal citation omitted); *Strathie v. Department of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983) (noting that program administrators are entitled to deference based on their experience and knowledge of the program at issue, but rejecting "broad judicial deference" as applied under rational basis scrutiny because it "would substantially undermine Congress' intent in enacting section 504"); *Doe v. New York University*, 666 F.2d 761, 776 (2d Cir. 1981).

Contrary to Petitioners' argument, the ADA does not forbid prison officials from taking appropriate steps such as placement in protective custody housing to ensure the safety of disabled prisoners. Pet'r Br. at 29.

[18]*See also Crowder v. Kitagawa*, 81 F. 3d 1480, 1486 (9th Cir. 1996) (remanding for factfinding regarding state's animal quarantine law as applied to blind plaintiffs who relied on trained guide dogs; "determination of what constitutes a reasonable modification is highly fact-specific, requiring a case-by-case inquiry"); *Strathie v. Department of Transp.*, 716 F.2d 227, 231 (3d Cir. 1983) (requiring development of a factual record to determine if a hearing-impaired school bus driver was "otherwise qualified" for a license and if reasonable modifications affect the "essential nature" of the job or impose an undue burden); *Martin v. Voinovich*, 840 F. Supp. 1175, 1191 (S.D. Ohio 1993) (noting the prematurity at motion to

A. The Statute Requires *Reasonable* Modifications

The ADA regulations governing existing facilities do not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.150(a)(1), or "[r]equire a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3).[19]

Public entities are not required to make fundamental alterations in their programs:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7).

In making this assessment, the courts have largely

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dismiss stage of assuming that if a § 504 violation were found, a court would order expansion or creation of new programs).

[19]This regulation was based upon the anti-discrimination provisions of the regulations implementing Section 504 and "therefore [is] already familiar to State and local entities covered by Section 504. " 28 C.F.R. pt. 35 app. A at 474.

upheld state policies. *See,* e.g., *DeBord v. Board of Educ. of Ferguson-Florissant*, 126 F.3d 1102 (8th Cir. 1997) (finding that school district's refusal to give excessive doses of Ritalin beyond the recommended level to a child suffering from attention deficit disorder was not unreasonable), *reh'g en banc denied, and petition for cert. filed*, 66 U.S.L.W. 3532 (U.S. Feb. 6, 1998) (No. 97-1297); *Easley by Easley v. Snider*, 36 F.3d 297 (3d Cir. 1994) (requiring the state to provide access to the attendant home care program regardless of patients' mental altertness through the use of surrogates would fundamentally alter the program).

But, where state agencies fail to demonstrate any fundamental alteration of their programs or any attempt to provide reasonable accommodations, they are not entitled to deference. *See Helen L. v. DiDario*, 46 F.3d 325 (3d Cir.) (finding that state's refusal to allow physically disabled patients into attendant home care program was not justified where state failed to establish undue burden, and resulting nursing home placement was significantly more costly to the state), *reh'g en banc denied, and cert. denied*, 516 U.S. 813 (1995); *Love v. Westville Correctional Ctr.*, 103 F.3d 558, 560-61 (7th Cir. 1996) (finding ADA violation where state presented no evidence showing its efforts to reasonably accommodate quadriplegic prisoner's participation in programs).

In applying the ADA's "reasonable modification" and "undue burden" standards, courts have thus made individualized determinations based upon facts that take into account the specific operational concerns of program administrators, including prison officials. There is no basis for exempting prisons from the statute's flexible approach.

B. The Statutory Liability of Prison Officials Should Not Be Analyzed Differently from that of Other Government Officials

This Court need not define the appropriate standard of review governing ADA claims in the state prison context because that issue arises only after resolution of the issue presented, that is, application of the statute to state prisons. In the event that the Court reaches the standard of review, prison officials should be treated no differently from other state officials named as defendants under the statute.

In urging this Court to read into the ADA the standard from *Turner v. Safley*, 482 U.S. 78 (1987),[20] Petitioners abandon their reliance on the clear statement requirement. There is nothing in the language or history of the ADA suggesting that Congress intended to apply a different ADA standard in the prison context than in other contexts. The Eleventh Circuit recently declined to apply *Turner* to a Rehabilitation Act claim in the prison context without a congressional statement to that effect. *Onishea v. Hopper*, 126 F.3d 1323, 1336 (11th Cir. 1997), *vacated, reh'g en banc granted*, 133 F.3d 1377 (11th Cir. 1998). In so doing, the court in *Onishea* noted that the generally applicable statutory standards take into consideration the special setting of prisons.

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[20]In *Turner v. Safley*, this Court established a four-part test to determine whether regulations that impinge on prisoners' constitutional rights are reasonably related to a legitimate penological objective. While the *Turner* test is deferential to prison administrators, it is "not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). Among the factors analyzed under *Turner* is the impact on other prisoners, staff and resources of accommodating prisoners' rights, which is similar to the ADA standard calling for "reasonable modifications" that do not "fundamental[ly] alter" the program.

Id.

In short, the ADA's "reasonable modification" and "undue burden" standards are necessarily applied in light of the unique issues raised in the prison context. That is all that prison officials can ask. More importantly, it is all that Congress has required.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 30, 1998